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No. 05-128

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IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC., *et al.*,

Petitioners,

v.

ZURICH AMERICAN INSURANCE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under Section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered", as held by the Fourth and Ninth Circuits, or is such a claim not entitled to Section 507(a)(4) priority, as held by the Sixth, Eighth and Tenth Circuits?

LIST OF PARTIES AND 29.6 STATEMENT

The following is a complete list of all parties with an interest in the outcome of this litigation.

Petitioners herein:

Howard Delivery Service, Inc.

Official Committee of Unsecured Creditors of Howard Delivery Service, Inc.

Neither petitioner has a parent company and no publicly held company owns 10% or more of the stock of either petitioner.

Respondent herein:

Zurich American Insurance Company

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OPINIONS BELOW

The ruling below of the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") is reported as *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, 403 F.3d 228 (4th Cir. 2005) (per curiam), and is printed at Pet. App. 1a.

That decision reversed and remanded an unpublished Memorandum Opinion and Order entered by the United States District Court for the Northern District of West Virginia (the "District Court"), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, No. 3:03CV61, (N.D.W. Va. Dec. 22, 2003, as entered Dec. 23, 2003). It is available in electronic form at 2003 U.S. Dist. LEXIS 26464, and is printed at Pet. App. 39a.

The decision of the United States District Court for the Northern District of West Virginia affirmed an unpublished Memorandum Opinion of the United States Bankruptcy Court for the Northern District of West Virginia (the "Bankruptcy Court"), *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, BK No. 02-30289, (Bankr. N.D.W. Va. July 15, 2003), which is available in electronic form at 2003 Bankr. LEXIS 2142, and is printed at Pet. App. 51a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the interpretation of § 507(a)(4) of the Bankruptcy Code, 11 U.S.C. § 507(a)(4),[1] which provides as follows:

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan –

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of –

(i) the number of employees covered by each such plan multiplied by $4,650;[2] less

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1. Effective April 20, 2005, § 507(a)(4) of the Bankruptcy Code was renumbered as § (a)(5) under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Pub. L. No. 109-8, § 212 (2005). All citations to the Bankruptcy Code refer to the Code as it existed when the Fourth Circuit's decision was entered.

2. The dollar amount was amended to $2,400 in 1978 and has been raised several times pursuant to § 104(b)(1) of the Bankruptcy (Cont'd)

> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

STATEMENT OF THE CASE

A. Statement of the Facts

The relevant facts in this case are not in dispute. For many years, Petitioner Howard Delivery Service, Inc. ("Howard") owned and operated a freight carrier business that serviced the Midatlantic and Midwest regions. Pet. App. 3a.

Howard was subject to the workers' compensation statutes in the various states in which it did business, including West Virginia, where its principal place of business was located. These statutes establish a comprehensive system of mandatory workers' compensation. *Id.* For example, pursuant to the West Virginia statute, W. VA. CODE § 23-1-1 to -19 (1988), Howard was required to fund payment of workers' compensation benefits either by subscribing to the State's Workers' Compensation Fund (the "Fund") or obtaining from the West Virginia State Compensation Commissioner authority to opt out of the Fund and become

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(Cont'd)

Code, 11 U.S.C. § 104(b)(1). It is now set at $10,000. The dollar amount was $4,650 when Petitioner Zurich American Insurance Company sought priority treatment of its claim from the Bankruptcy Court.

a self-insurer. All claims by employees are filed with and processed by the Fund, including claims by employees of self-insurers that have opted out of the Fund. *Id.*

To comply with these statutory requirements, Howard entered into an agreement with Respondent Zurich American Insurance Co. ("Zurich") in 1997 to provide Howard's workers' compensation insurance coverage, together with other forms of liability coverage. *Id.* These policies took effect on July 1, 1997 and remained in effect until January 22, 2002, when they were canceled. *Id.* Under the terms of the 1997 agreement, Howard was required to reimburse Zurich for all losses under the workers' compensation policies up to $250,000. *Id.* at 4a n2.

B. Procedural History

Howard filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on January 30, 2002. *Id.* at 4a. On May 9, 2002, Zurich filed two proofs of claim in the bankruptcy case, each of which was for insurance premiums in an unliquidated amount. JA 32a, 33a. Proof of Claim No. 120 asserted priority status as an "administrative expense – insurance premiums" pursuant to 11 U.S.C. § 507(a)(2) or (a)(5), not as contributions to an employee benefit plan pursuant to 11 U.S.C. § 507(a)(4). JA 32a. Proof of Claim No. 121 was an unsecured nonpriority claim and is not relevant.

On or about March 17, 2003, Howard filed Debtor's Request for Estimation of Unliquidated Claims of Zurich American Insurance Company, requesting that the bankruptcy court estimate the unliquidated claims set forth in Proofs of Claim Nos. 120 and 121. JA 25a. On March 28, 2003, Zurich amended its claims by filing Amended Proofs of Claim Nos. 306 and 307. Claim No. 306 amended Claim No. 120

in two relevant respects: it changed the claim amount from unliquidated to $410,215.00, and it changed the basis for claiming priority treatment to § 507(a)(4), relating to contributions to an employee benefit plan. JA 34a. Proof of Claim No. 307 amended Claim No. 121 and is not relevant.

On June 12, 2003, Howard filed a written objection to Proof of Claim No. 306, arguing that the claim was not entitled to priority under § 507(a)(4) because the unpaid insurance premiums upon which the claim was based did not constitute "contributions to an employee benefit plan." JA 21a. Howard also objected to the amount of the claim. *Id.* The Bankruptcy Court entered a memorandum opinion on July 15, 2003, holding that Zurich's claim was not entitled to priority under § 507(a)(4), and therefore upheld Howard's objection to the claim. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, BK No. 02-30289, 2003 Bankr. LEXIS 2142 (Bankr. N.D.W. Va. 2003); Pet. App. 51a. The court ordered that Zurich's proof of claim be modified from an unsecured priority claim to an unsecured non-priority claim. Pet. App. 57a.

On appeal, the District Court agreed with the Bankruptcy Court that the unpaid insurance premiums due Zurich were not "contribution to an employee benefits plan" and thus not entitled to priority under § 507(a)(4), and entered a memorandum opinion and order affirming the Bankruptcy Court's decision. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv., Inc.)*, No. 3:03CV61, 2003 U.S Dist. LEXIS 26464 (N.D.W. Va. 2003, Dec. 22, 2003, as entered Dec. 23, 2003); Pet. App. 39a. Zurich thereafter took an appeal to the Fourth Circuit.

On March 24, 2005, the Fourth Circuit reversed the District Court's decision by a fractured per curiam ruling. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re*

Howard Delivery Serv., Inc.), 403 F.3d 228 (4th Cir. 2005); Pet. App. 1a. There was no majority or plurality opinion of the court.

Judge King wrote an opinion concurring in the judgment in which he found that the language of § 507(a)(4) is plain and unambiguous and that the unpaid premiums constituted "contributions to an employee benefits plan arising from services rendered." 403 F.3d at 232, Pet. App. 8a. By contrast, Judge Shedd, in his concurring opinion, found the language of § 507(a)(4) to be ambiguous. 403 F.3d at 239, Pet. App. 23a. Nevertheless, Judge Shedd ultimately agreed with Judge King that Zurich's claim was entitled to priority, but relied instead upon a provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.S. § 1001-1461, that referred to the term "employee benefit plan." *Id.*

Judge Niemeyer issued a dissenting opinion in which he found that:

> [t]he plain language of § 507(a)(4), which gives priority to claims for unpaid "contributions to an employee benefit plan arising from services rendered," does not cover claims for unpaid insurance premiums charged to cover the statutory liability of the employer to its employees. The unpaid insurance premium is not an unpaid *contribution*; it is not an unpaid contribution *to an employee benefit plan*; and it does not arise out of an employee's *services rendered* in that it is not a *wage surrogate*.

403 F.3d at 244, Pet. App. 35a (emphasis in original). Judge Niemeyer further found that the opinions of Judge King and Judge Shedd violated the underlying rule that priorities under the Bankruptcy Code are to be narrowly construed. 403 F.3d at 244, Pet. App. 36a. (Niemeyer, J., dissenting).

On November 7, 2005, this Court granted Howard's and the Official Committee of Unsecured Creditors of Howard Delivery Service, Inc.'s ("Committee") Petition for Writ of Certiorari challenging the Fourth Circuit's holding.

SUMMARY OF ARGUMENT

A fundamental principle underlying the Bankruptcy Code is that creditors should generally be treated equally. *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930). If the claims of certain creditors are to be given priority over the claims of other creditors, that priority must be authorized by Congress in clear and precise terms. *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952) (Jackson & Black, J.J., dissenting).

The language of § 507(a)(4) of the Bankruptcy Code specifically limits priority treatment to "contributions to an employee benefit plan arising from services rendered." Applying the plain meaning of these words, premiums due under a workers' compensation liability insurance policy are not entitled to priority treatment.

First, the premiums are not "contributions" under the plain definition of this term. The premiums do not constitute voluntary or negotiated "contributions" by an employer, but instead are required payments made to discharge a statutorily mandated liability.

Second, workers' compensation insurance coverage is not an "employee benefit plan." The term "employee benefit plan" is not defined in the Bankruptcy Code, and it is not appropriate to look to ERISA for such a definition. The various definitions contained in ERISA were specifically designed to effectuate the purposes of ERISA, not the Bankruptcy Code. There is no reason to believe that when Congress used the words "employee benefit plan" in the

Bankruptcy Code, it intended to incorporate the ERISA definition of these words into the Bankruptcy Code.

Unlike pension plans or life, health or disability insurance plans, workers' compensation insurance is a legally mandated, non-negotiated form of risk allocation. Rather than serving as a wage substitute, it is a statutory obligation that employers must meet, regardless of the wages or other fringe benefits that they provide their employees. The coverage is not something that can be bargained for in lieu of higher wages or other benefits; it is provided by statute, and employees are subject to workers' compensation coverage whether or not the insurance premiums are paid. It is the employer, rather than the employee, that is the principal beneficiary of a workers' compensation insurance policy.

Third, the claim for unpaid premiums does not "arise from services rendered." It arises instead from the employer's default in payment to the insurance company, not from services rendered by the employees.

Even if § 507(a)(4) is deemed ambiguous, making it necessary to look to the Congressional intent behind the provision, the legislative history makes clear that premiums paid for a workers' compensation insurance policy are not contributions to an employee benefit plan, since workers' compensation insurance is a statutorily mandated system of risk allocation and not a wage substitute.

Congress enacted § 507(a)(4) specifically to overrule the holdings of two Supreme Court cases that had limited the existing wage priority and did not recognize various wage substitutes or fringe benefits that are often bargained for in lieu of wages. *See United States v. Embassy Rest., Inc.*, 359 U.S 29 (1959); *Joint Indus. Bd. v. United States*, 391 U.S. 224 (1968). Section 507(a)(4) was intended to give priority

status to claims for such fringe benefits, and there is nothing in the legislative history to suggest that § 507(a)(4) was intended to extend priority treatment beyond such fringe benefits. *See, e.g., State Ins. Fund v. Southern Star Foods, Inc.* (*In re Southern Star Foods, Inc.*), 144 F.3d 712, 716 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998).

The Sixth, Eighth and Tenth Circuits have all held, consistent with the dissenting opinion of Judge Niemeyer in the decision below, that premiums due under a workers' compensation insurance policy are not contributions to an employee benefit plan. The concurring opinions of Judges King and Shedd and the decision of the Ninth Circuit in *Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993), do not withstand scrutiny in light of the reasoning relied upon by these other Circuit Courts. Accordingly, the Court should reverse the Court of Appeals and hold that the claims of Zurich are not entitled to priority treatment under § 507(a)(4) of the Bankruptcy Code.

ARGUMENT

Section 507(a)(4) of the Bankruptcy Code grants a fourth priority to claims for "contributions to an employee benefit plan – arising from services rendered within 180 days before the date of the filing of the petition[.]" 11 U.S.C. § 507(a)(4). The only issue in this case is whether Zurich's claim for unpaid premiums due under the workers' compensation insurance policy issued to Howard is entitled to such priority. Both the plain language of § 507(a)(4) and its legislative history demonstrate that Zurich's claim is not entitled to priority, and that granting Zurich's claim priority treatment impermissibly broadens the scope of § 507(a)(4) in derogation of the fundamental principles underlying the Bankruptcy Code.

I. Under the Plain Meaning of § 507(a)(4) of the Bankruptcy Code, a Claim for Premiums Due Under a Workers' Compensation Insurance Policy Is Not Entitled to Priority Treatment.

As in all cases involving statutory construction, the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (finding that the term "employee" in Title VII is ambiguous in its context). To determine if the language is plain, the court "must consider the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. If the statutory language is clear and unambiguous, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

At issue in this case are the terms "contribution," "employee benefit plan," and "arising from services rendered." None of these terms are defined in the Bankruptcy Code, nor has this Court had a prior occasion to construe them. In determining their meaning in § 507(a)(4), the Court must consider the specific language itself, the context of that language, and the broader context of the statute as a whole. *Robinson*, 519 U.S. at 341. The broader context of the statute is of particular importance here.

> [I]n construing provisions of the Bankruptcy Code, we keep in mind its overriding objective of providing to creditors equal distribution of a debtor's limited resources. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). Because of this broad equitable purpose, statutory priorities must be

> narrowly construed. *See Travelers Prop. Cas. Corp.*, 224 F.3d at 517; *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989); *Isaac*, 853 F.2d at 1530.

Howard Delivery, 403 F.3d at 242 (per curiam) (Niemeyer, J., dissenting); Pet. App. 30a.

A class of creditors may receive preferential treatment only through clear authorization from Congress. *See United States v. Embassy Rest., Inc.* 359 U.S. 29, 31 (1959). Accordingly, if a particular type of claim is not identified clearly and unequivocally in the priority provisions of the Bankruptcy Code, it must be that "Congress had no intention of giving the claim priority." *See Nathanson*, 344 U.S. at 29; *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831 F.2d 106, 110 (6th Cir. 1987). It is for Congress, not the courts, to create a new priority. *See Caminetti*, 242 U.S. at 485.

The Fourth Circuit's opinion cannot be reconciled with these principles.

1. The insurance premiums are not "contributions."

In his concurring opinion, Judge King draws upon the 1981 edition of Webster's Third New International Dictionary to find that the definition of "contribution" is broad enough to encompass statutorily mandated insurance premium payments. *Howard Delivery*, 403 F.3d at 235; Pet. App. 14a. Yet, looking to an earlier version of same source – the 1976 edition of the dictionary that was in existence when § 507(a)(4) was enacted – the Bankruptcy Court in *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re HLM Corp.)*, 165 B.R. 38 (Bankr. Minn. 1994), *aff'd* 183 B.R. 852 (D. Minn.

1994), *aff'd* 62 F.3d 224 (8th Cir. 1995), reached the opposite conclusion. According to the 1976 edition of Webster's Third International Dictionary, the verb "contribute" is defined as "to give or to grant in common with others (as to a common funds or to a common purpose): give (money or other aid) for a specified object." As the court noted,

> [t]his definition implies some sort of voluntary act. Typically, fringe benefits such as health, life and disability insurance are voluntarily given. Yet the payment of workers' compensation insurance premiums is not "voluntary." Rather, it is statutorily mandated.

Id. at 40.[3]

Preferring Random House to Webster's, the Sixth Circuit, in *Travelers Property Casualty Corp. v. Birmingham-Nashville Express, Inc. (In re Birmingham-Nashville Express, Inc.)*, 224 F.3d 511 (6th Cir. 2000), reached the same conclusion as the bankruptcy court in *HLM Corp.* that workers' compensation insurance premiums were not "contributions." However, the Sixth Circuit based its decision on the fact that the term at issue connotes a shared, rather than unilateral, act. According to *The Random House Dictionary Of The English Language* 318 (1981), the word "contribute" generally describes the giving of something

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3. *Accord Travelers Prop. Cas. Corp. v. Birmingham Nashville Express, Inc. (In re Birmingham-Nashville Express, Inc.)*, 224 F.3d 511, 513 (6th Cir. 2000) ("The word 'contribution' generally connotes an optional choice such as an employer's decision to provide fringe benefits like health, life or disability insurance."); *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997), *aff'd* 214 B.R. 761 (E.D. Pa. 1997) ("Simply put, since workers' compensation benefits are a statutory requirement not obtained through collective bargaining, they cannot be considered a 'contribution' to an employee benefit plan.").

"*along with others* to a common, supply, fund, etc." Thus, the Court concluded that "the term 'contribution' does not describe a unilateral purchase of some product or service." *Id.* at 515 (emphasis added).

The majority of circuit courts that have considered this issue thus have concluded that premiums paid for state-mandated workers' compensation liability insurance are not "contributions" as that term is used in § 507(a)(4) of the Bankruptcy Court. *See HLM Corp.*, 62 F.3d at 227 (holding that unpaid pre-petition premiums under Minnesota's workers' compensation statute do not constitute "contributions to an employee benefit plan"); *State Ins. Fund v. Southern Star Foods, Inc.*, 144 F.3d 712, 717 (10th Cir. 1998), *cert. denied*, 525 U.S. 978 (1998). (holding that premiums for workers' compensation insurance are not contributions to an employee benefit plan as contemplated by Congress in the enactment of § 507(a)(4)); *Birmingham-Nashville Express*, 224 F.3d at 515 (finding that employees could not have made a contribution where workers' compensation premiums were paid in full by the employer as required by state law). *But see In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) (finding that premiums owed to the insurer constituted contributions under § 507(a)(4)). At best, the contrary holding of Judge King[4] suggests that the term "contribution" may be ambiguous, thus compelling a review of the legislative history of § 507(a)(4), as discussed in section II below.[5]

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4. Neither Judge Shedd nor Judge Niemeyer specifically address the proper interpretation of the term "contribution."

5. *See, e.g., State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.)*, 144 F.3d 712, 715 (10th Cir. 1998), *cert.* (Cont'd)

2. A workers' compensation insurance policy is not an "employee benefit plan."

The two concurring opinions of the Fourth Circuit panel found that the workers' compensation liability insurance policy provided by Zurich in accordance with the requirements of West Virginia law fell within the definition of an "employee benefit plan." Yet, there was no agreement between the concurrences as to why that is so.

Judge King looked to the dictionary definitions of the individual words "benefit" and "plan," and he concluded the phrase was unambiguous. *Howard Delivery*, 403 F.3d at 235; Pet. App. 16a-17a. According to *Webster's Third International Dictionary* (1976), a "plan" is a "detailed and systematic formulation of a large-scale . . . program of action," and a "benefit" is a "cash payment provided for under an . . . insurance plan" or "financial help in time of sickness, old age, or unemployment." 403 F.3d at 236, Pet. App. 16a-17a. Yet, these certainly are not the only definitions of these words and Judge King failed to consider whether "Congress could have intended the phrase 'employee benefit plan' to be a term of art having a specific meaning different from the sum of what these three words mean individually." 403 F.3d at 239, Pet. App. 24a. (Shedd, J., concurring). Moreover, Judge King did not consider whether the plain meaning he attributed to the individual words in § 507(a)(4) was consistent with their usage within the broader context of the Bankruptcy Code. An approach that relies solely on generic dictionary definitions of words like "plan" and "benefit" ignores the specific content in which the words are used and, in the specific context of § 507(a)(4), fails to factor in the principle that bankruptcy priorities must be narrowly construed.

(Cont'd)
denied, 525 U.S. 978 (1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase 'contributions to an employee benefit plan.'").

Judge Shedd recognized the defect in this approach, noting that "Judge King picks and chooses from accepted dictionary definitions" and that, while the results of such an approach "might be one reasonable interpretation of these words, it is not the *only* reasonable interpretation." *Id.* (Shedd, J., concurring).

Contrary to the opinion of Judge King, Judge Shedd found the phrase "employee benefit plan" to be ambiguous and thus looked to the legislative history for guidance. *Id.* (Shedd, J., concurring). However, Judge Shedd reached the erroneous conclusion that the language was controlled by the provisions of ERISA, which contains its own definition of "employee benefit plan."[6] Notably, it is Judge King who points out the flaw of this approach:

> Importantly, the Supreme Court has held that, for purposes of construing terms found in the Bankruptcy Code, it is inappropriate to incorporate characterizations of a term in another statute absent some congressional indication that this was intended. *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 225 (1996).

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6. Judge Shedd based his conclusion primarily on the fact that one witness who testified at the hearings on proposed § 507(a)(4) suggested that the wording of the provision should parallel the language of ERISA so that priority would be granted to "any contributions to an employee benefit plan as defined in ERISA § 3(3)." 403 F.3d at 240, Pet. App. 25a. The fundamental flaw in this argument is that the final language of § 507(a)(4) does not include the phrase "as defined in ERISA § 3(3)" although Congress could easily have included this phrase if it had intended for the ERISA definition to apply to § 507(a)(4). Additionally, neither the Senate Report nor the House Report contains any indication that the suggestion made by this one witness who testified a full two years earlier was considered, let alone adopted.

> I therefore decline to rely upon the ERISA definition.

Id. at 235 n.4; Pet. App. 15a n.9.

That very admonition was given with respect to the interpretation of bankruptcy priorities by this Court in *Embassy Restaurant, Inc.*, 359 U.S. 29, 33 (1959). There, the Court expressly rejected the argument that fringe benefits should be deemed to be "wages" because they were found to be within the definition of wages under the National Labor Relations Act, 29 U.S.C.A. § 151, and the Social Security Act, 42 U.S.C.A. § 301: "We construe the priority section of the Bankruptcy Act, not those statutes." *Id.* Consistent with this Court's reasoning in *Embassy Restaurant*, the Sixth Circuit, in *Birmingham-Nashville Express*, held that incorporation of ERISA into the Bankruptcy Code was "ill-advised" since "[t]hose two pieces of legislation serve different and non-overlapping purposes." 224 F.3d at 517. Likewise, the Tenth Circuit in *Southern Star Foods* declined to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code, noting that "[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code" and that "broadening the Bankruptcy Code by incorporating the ERISA definition into the § 507(a)(4) priority determination would be contrary to the tenet that priorities are to be narrowly construed." 144 F.3d at 714.

Moreover, Congress has demonstrated that when it intends to incorporate provisions of ERISA into the Bankruptcy Code, it does so in express terms. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, enacted on April 20, 2005, contains examples of this. Section 704(a)(11) now addresses the responsibilities of a Chapter 7 trustee when the debtor had maintained an employee benefit plan prior to filing for

bankruptcy. The amended provision provides that "[t]he trustee shall – (ii) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served *as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan*, continue to perform the obligations required of the administrator." Pub. L. No. 109-8, § 446 (2005) (emphasis added). A parallel provision was added to § 1106(a)(1) of the Bankruptcy Code. *Id.*

By contrast, § 724(f) of the Bankruptcy Code, Pub. L. No. 109-8 § 701 (2005), was amended by BAPCPA to exempt "claims for contributions to an employee benefit plan" from certain tax liens, but Congress did not incorporate the definitions contained in ERISA, as it did in §§ 704(a)(11) and 1106(a)(1). Moreover, Congress did not amend § 507(a)(4) as part of BAPCPA to incorporate ERISA into the definition of "employee benefit plan," although it easily could have done so if it wished to overrule the decisions reached by the Sixth, Eighth and Tenth Circuits on the meaning of this term.[7]

Furthermore, the words "employee benefit plan" must be interpreted in light of the broader context in which § 507(a)(4) of the Bankruptcy Code is used and consistent with the overriding principle of bankruptcy law that claim priorities are to be narrowly construed. *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968). Adhering to these principles, Judge Niemeyer, in his dissenting opinion, correctly concluded that the plain meaning of "employee benefit plan" did not include a workers' compensation insurance policy.

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7. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (finding failure of Congress to amend priority provisions of Bankruptcy Code was an indication that Congress did not intend to overrule prior court interpretations).

Workers' compensation insurance is liability or indemnity insurance that is statutorily mandated to cover the liability of an employer for workplace injuries. As with other state workers' compensation statutes, the West Virginia Workers' Compensation Act "was designed to remove negligently caused industrial accidents from the common law tort system." *Belcher v. J.H. Fletcher & Co.*, 498 F. Supp. 629, 630-31 (S.D.W. Va. 1980) (citing *Mandolis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978)). Rather than constituting a "plan" for providing "employee benefits," it is "a statutorily mandated system to spread the risks of work-related injuries." *Employers Ins. of Wausau, Inc. v. HLM Corp. (In re HLM Corp.)*, 165 B.R. 38, 40 (Bankr. Minn. 1994), *aff'd* 183 B.R. 852 (D. Minn. 1994), *aff'd* 62 F.3d 224 (8th Cir. 1995). An employer does not buy workers' compensation insurance to benefit its employees; it buys it to comply with the law and to protect itself against employee claims. In exchange, the legislature abrogates the employee's right to pursue common law tort claims for workplace injuries.[8] It is "no different than motor vehicle liability insurance that many states require drivers to carry. This is clearly an insurance scheme. It is not a plan." *Id.* at 41. Indeed,

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8. As the Bankruptcy Court in *In re HLM Corp.* explained,

> Generally, workers' compensation laws mandate that, unless an employer is specifically exempted, an employer is statutorily liable to compensate an employee for any work-related injury. This is generally a condition of exercising the privilege of transacting business in that state. In return, the employee accepting the benefits is deemed to have waived his or her common-law rights to recover from the employer whose negligence may have contributed to the injury.

Id. at 41 n.4 (citing Spencer LeRoy et al., *Workers' Compensation in Bankruptcy: How do the Parties Fare?* 24 TORT & INS. L.J. 593 (1989)).

it is no different than any policy of liability insurance — directors and officers liability insurance, fire and theft insurance, general liability insurance — that protect the employer against claims that may be brought against it by its employees.[9]

Congress has clearly demonstrated that it recognizes the distinction between workers' compensation benefits and wages and fringe benefits. As this Court observed in *Embassy Restaurant*, Congress specifically dealt with workers' compensation claims in bankruptcy when it amended the Bankruptcy Act in 1934 to allow workers' compensation claims as provable debts. At that time, it granted workers' compensation claims a level seven priority, separate and distinct from the then level four priority accorded wages. 359 U.S. at 556. In 1938, Congress completely abolished all priority treatment for workers' compensation claims. *Id.*

Two conclusions can be drawn from these legislative acts. First, when Congress wanted to address the effect of bankruptcy on workers' compensation claims, it had no difficulty expressing itself in clear and precise terms. When it wanted workers' compensation claims to have priority in bankruptcy, it expressly provided that such claims would have level seven priority. Second, Congress did not (at least during 1934-1938) view workers' compensation claims to be entitled to the same priority as wage claims. In 1938, it was of the view that workers' compensation claims should receive no priority. At no time since 1938 has Congress in any definitive fashion indicated that claims relating to workers' compensation should receive any manner of priority.

9. That these other types of insurance protect the employer against the claims of third parties as well as those of employees is of no consequence. Under Judge King's unduly broad reading of the statute, any insurance policy that inures to the benefit of employees arguably would fall within the definition of an "employee benefit plan."

Moreover, the passage and subsequent repeal of priority status for workers' compensation claims demonstrates that Congress recognized a distinction between workers' compensation benefits and other forms of employee compensation.

There are several significant distinctions between workers' compensation insurance policies and the various health, welfare and pension plans that have been found to fall within the definition of "employee benefit plan." Of particular significance is the fact that, unlike workers' compensation coverage, these other plans are entirely voluntary and only available (at least at the employer's expense) if the employer so chooses. If the employer chooses not to provide its employees with these fringe benefits, it suffers no consequence and the employee receives no benefit. By contrast, if the employer fails to maintain an adequate workers' compensation liability insurance policy, it is subject to various statutory penalties, *but* the employee still receives his full benefits from the state's workers' compensation fund. Thus, the employee is ultimately in the same position with or without the workers' compensation insurance policy, and it is the employer that benefits most directly from the existence of the policy.

The bankruptcy court in *In re HLM Corp.* recognized this distinction in its review of the Minnesota workers' compensation statute, which mirrors the West Virginia statute. 165 B.R. at 41. The court observed that with employee benefit plans, such as employer-sponsored health care, the employee is the insured party and thus is the one who benefits and who suffers if the plan payments are not made.

> By contrast, workers' compensation insurance insures the *employer* from its liability to provide workers' compensation benefits. The fact that the employer is uninsured does not leave the employee without workers' compensation

> coverage, for the employee will still receive benefits from a special compensation fund. See Minn. Stat. § 176.183 subd. 1 (1992). The employee may also have additional remedies against the employer. See Minn. Stat. § 176.181 subd. 3 (1992); *Rezac v. Maier (In re Maier)*, 38 B.R. 231, 234 (Bankr. D. Minn. 1984). Accordingly, the payment of workers' compensation premiums to the insurer does not "benefit" the employee, but rather "benefits" the employer.

HLM Corp. at 41 (emphasis added). By the same token, employees cannot bargain with their employer for or against these workers' compensation benefits. They are fixed by statute. In contrast, health, welfare and pension benefits can be, and typically are, the subject of negotiation between employee and employer as part of a bargained-for compensation package that includes both wages and non-wage fringe benefits.

As some courts have noted, the fringe benefits need not be the result of wage concessions made in the arena of collective bargaining in order to fall within the scope of § 507(a)(4). In *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983), the First Circuit was faced with the issue of whether unpaid premiums for employee group life, health and disability insurance were entitled to priority treatment under § 507(a)(4). The employees of the debtor in *Saco* were not unionized, so the health benefits in question were not the product of collective bargaining. However, there was testimony in the record that the health plan was the result of a *de facto* "bargain" in which employees accepted lower wages in return for a health plan that was funded solely by the debtor employer. *Id.* at 448. The trustee for the debtor argued that § 507(a)(4) was limited to employee benefit plans that the employer was contractually obligated to provide, such as those contained in collective bargaining agreements. The trustee further argued that the priority was not available to insurers, but only to employees or their fiduciaries.

Speaking for the court, then-Judge Breyer rejected each of the trustee's arguments. First, he found nothing in the legislative history of § 507(a)(4) to suggest that Congress intended the priority to be available only to those employee benefit plans that were the result of collective bargaining agreements, noting that "insurance is no less a fringe benefit because it is granted by an employer 'unilaterally' rather than being provided under the terms of a collective bargaining agreement." *Id.* at 449.[10] Second, the court found that the insurance company providing the health coverage was within the scope of § 507(a)(4) to the same extent as the employee or the employee's representative, reasoning that "to allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled." *Id.*

The holding in *Saco* is in no way inconsistent with the holdings of the Sixth, Eighth and Tenth Circuits on the issue of unpaid workers' compensation insurance premiums. *See, e.g., Southern Star Foods*, 144 F.3d at 716-717. First, *Saco* did not involve workers' compensation insurance and, consequently, the court did not have occasion to consider the various important distinctions between workers' compensation liability insurance required by statute and group life, health and disability insurance offered as an inducement to employment. Second, the court extended § 507(a)(4) priority treatment to the insurance companies issuing the group health, life and disability policies based on the rationale that such priority treatment is the surest way to provide the employees themselves with the benefits to which they are entitled. This rationale does not apply in the case of workers' compensation insurance. As courts dealing

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10. Judge Breyer did note, however, that the benefit was the result of a *de facto* bargain in that the debtor used the insurance plan to attract employees and was able to offer lower wages in exchange for the benefits provided under the health plan.

specifically with workers' compensation insurance have duly noted, the employee receives the same benefit whether or not the premiums are paid. *See, e.g., In re HLM Corp.*, 62 F.3d at 226. Thus, extending priority treatment under § 507(a)(4) to insurance companies merely puts the insurance companies in a better position *vis-à-vis* other creditors; it does not protect the employees of the debtor as the statute intended.[11]

The inherent distinction between workers' compensation insurance coverage and wage substitutes such as life insurance, health insurance and pension benefits, is further reinforced by the context in which § 507(a)(4) appears within the priority scheme of the Bankruptcy Code. Rather than existing in isolation, § 507(a)(4) is inexorably tied to § 507(a)(3), which provides priority treatment for wages, salaries, or commissions, including vacation, severance and sick leave pay, earned within 90 days before bankruptcy or cessation of the debtor employer's business, but only up to $4,650[12] per employee. It is apparent that § 507(a)(4) is meant to extend this wage priority to other forms of employee compensation, but only to the extent that the priority is not fully utilized by § 507(a)(3). By its terms, the amount given priority under § 507(a)(4) is limited to the difference between the priority claimed under § 507(a)(3) and the $4,650 per employee cap.

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11. Indeed, allowing the insurance companies to share the assets of the estate at a higher level of priority actually can harm the employees, since the employees' § 507(a)(4) priority claims, as well as any non-priority claims they may have, stand to be diluted by the priority claims of the insurance companies. *See Embassy Rest.*, 359 U.S. at 34; *see also Edward W. Minte Co., Inc. v. Franey & Parr (In re Edward W. Minte Co., Inc.)*, 286 B.R. 1, 12 (Bankr. D.C. 2002) ("there will be cases in which the employees' § 507(a)(4) claims will receive a lesser payment if insurers are allowed a § 507(a)(4) priority for extending credit to the debtor").

12. As discussed in footnote 2, this amount is subject to change and is currently set at $10,000.

Sections 507(a)(3) and (a)(4) thus are to be read and applied together, and the term "employee benefit plan" in subsection (a)(4) must be interpreted in a way that is harmonious with the forms of employee compensation that are afforded priority under subsection (a)(3). For the reasons previously stated, workers' compensation insurance mandated by statute is fundamentally different than the forms of employee compensation expressly covered by § 507(a)(3) and that have been held to be wage substitutes falling within the meaning of "employee benefit plan" under § 507(a)(4).

Any extension of § 507(a)(4) beyond its intended scope has the effect of depriving other creditors of their rightful share of the assets of a debtor's estate. Where, as here, the assets of the estate are insufficient to pay all level four priority claims in full, creditors with allowed priority claims that are expressly covered by § 507(a)(4) will be forced to receive less if claims for unpaid workers' compensation insurance premiums are entitled to equal priority. In other cases, expansion of the scope of § 507(a)(4) will have a direct prejudicial effect on creditors holding claims with lower level priorities, or no priority at all. *See Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (expansion of priority to include additional claims has effect of reducing funds available to pay existing priority claims or claims of lesser priority).

Tax claims are included within the lower priorities that would be adversely affected by a broadening of the definition of "employee benefit plan." Moreover, such a result would be inconsistent with prior decisions that placed these tax claims, when based upon unpaid worker's compensation premiums, at level seven in the hierarchy of bankruptcy priorities, rather than at level four.

Section 507(a)(7)[13] provides a priority for certain excise tax claims of governmental units. Several courts, including the Fourth Circuit, have held that unpaid workers' compensation premiums due to the state are excise taxes for which the Bankruptcy Code specifically provides a level seven priority pursuant to § 507(a)(7)(E).[14] *See New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, 886 F.2d 714, 720 (4th Cir. 1989) (holding that unpaid workers' compensation premiums due to state compensation fund are entitled to § 507(a)(7) priority as excise taxes).[15]

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13. Section 507(a)(7) was renumbered to § 507(a)(8) under the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 304 (1994).

14. Section 507(a)(7)(E) provides as follows:

> The following expenses and claims have priority in the following order:
>
> . . . .
>
> (7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for –
>
> (E) An excise tax on –
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition . . .

15. *Accord Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338, 339 (6th Cir. 1993).

Indeed, in the course of recognizing a level seven priority for government claims in *New Neighborhoods*, the court seemed to suggest that no such priority existed for private insurers:

> Nor does the fact that, under the holding we state in this case, *a state agency is given, as an insurer, priority in bankruptcy when a private insurer is not* tip the scales against construing the workers' compensation premiums as "excise taxes" (footnote omitted); such a difference is really only a "distinction between the sovereign power of the state and rights of private citizenry."

866 F.2d at 720 (quoting *State Indus. Accident Comm'n v. Aebi*, 162 P.2d 513, 517 (Ore. 1945) (emphasis added). Apparently, when the Fourth Circuit rendered its decision in *New Neighborhoods*, it did not believe that a private insurer such as Zurich had a right to claim a priority for unpaid workers' compensation insurance premiums.[16]

Moreover, there is no basis for reading § 507(a)(4) as granting a level four priority to private insurance companies for unpaid workers' compensation insurance premiums when those same premiums, if owed to the state, are only entitled to level seven priority. If Congress had intended such disparate treatment, it would have stated so explicitly.[17]

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16. Even though this statement in *New Neighborhoods* is at odds with the subsequent decision of the Fourth Circuit in this case, neither concurring opinion below mentions, let alone attempts to resolve, these inconsistent holdings.

17. For example, pursuant to § 507(a)(7)(D) of the Bankruptcy Code, Congress specifically granted a level seven priority to governmental units for "an employment tax on a wage, salary, or (Cont'd)

As this Court held in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29, 31 (1959), a fundamental principle running through the Bankruptcy Code is that creditors should generally be treated equally, and if the claims of a class of creditors are to receive preferential treatment, the right to such treatment must have been authorized by Congress in clear and precise terms.[18] The plain language of § 507(a)(4) does not contain any clear indication that Congress intended private insurers who are owed unpaid premiums for workers' compensation insurance to receive preferential treatment over governmental units with claims for the same unpaid premiums. *New Neighborhoods* suggests that the contrary is true.[19] Accordingly, Judge King erred when he found that

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commission *of a kind specified in paragraph (3) of this subsection* earned from the debtor before the filing of the petition, ..." (emphasis added).

18. The court in *New Neighborhoods* acknowledged the importance of this principle, noting that:

> [w]hether workers' compensation premiums are taxes entitled to priority as excise taxes pursuant to 11 U.S.C. § 507(a)(7)(E) is to be determined as a matter of federal law so that the priority provision in the Bankruptcy Code can be "nationwide in its application," *City of New York v. Feiring*, 313 U.S. 283, 285 (1941) (involving a New York City sales tax); *In re Pan Am. Paper Mills, Inc.*, 618 F.2d at 162, and must be answered by reference to the "terms and purposes" of the bankruptcy statute. *New York v. Feiring*, 313 U.S. at 285.

866 F.2d at 718 (parallel citations omitted).

19. As the Sixth Circuit observed in *Birmingham-Nashville Express*, "[i]t is quite common for Congress to provide better treatment in the Bankruptcy Code for government creditors than is provided for private creditors." 224 F.3d at 518.

the plain meaning of the term "employee benefit plan" included workers' compensation insurance policies.[20]

3. Claims for unpaid workers' compensation insurance premiums do not arise from "services rendered."

Not all contributions to an employee benefit plan are entitled to priority under § 507(a)(4). By its express terms, the statute limits priority treatment to those contributions that "arise from services rendered." As with the terms "contributions" and "employee benefit plan," the Bankruptcy Code does not define the term "services rendered." The courts, not surprisingly, are split on the meaning of this term.

The term "services rendered" must first be considered on its face and in the broader context of the priority provisions of the Bankruptcy Code to determine whether its meaning is plain. The language itself does not suggest what type of services are included and by whom they are to be rendered. Nevertheless, the better reasoned cases have held that, given the narrow interpretation that priority provisions are to be given, the term "services rendered" is limited to services rendered by employees (or plan administrators on their behalf), not services rendered by a third party such as an insurance carrier. *See Edward W. Minte Co., Inc. v. Franey & Parr (In re Edward W. Minte Co., Inc.)*, 286 B.R. 1 (Bankr. D.C. 2002); *In re The Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D.N.C. 1997).

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20. If Judge King is correct, then the claims of governmental units for unpaid workers' insurance premiums logically should also be entitled to level four priority, in direct contravention of the Court's earlier decision in *New Neighborhoods*.

For example, relying upon the interplay between §§ 507(a)(3) and (a)(4), the bankruptcy court in *Minte* found that

> [b]y providing for a reduction of § 507(a)(4) priority by the amount of 507(a)(3) claims paid for wages, salaries and commissions arising, of course, from employees' services rendered, and by simultaneously limiting § 507(a)(4) priority to claims for contributions to an employee benefit plan "arising from services rendered," it may be reasonably inferred that the term "services rendered" in § 507(a)(4) refers to services by employees.

286 B.R. at 9.

In addition, the bankruptcy court in *Minte* noted that to extend the term "services rendered" to insurance companies would lead to illogical phraseology.

> If the term "services" includes the provision of insurance, this means that the insurer would be claiming priority for a "claim for [insurance coverage provided] to an employee benefit plan . . . arising from [insurance coverage provided]." This is double talk. The services § 507(a)(4) has in mind are the services of employees (a construction that eliminates such double talk).

Id. Thus, under the plain meaning of § 507(a)(4), insurance premiums for unpaid workers' compensation insurance premiums do not "arise from services rendered" and are not entitled to priority treatment.

4. The holding of *Plaid Pantries* and its progeny should not be adopted by this Court.

In his concurring opinion, Judge King notes that several cases, including the Ninth Circuit's decision in *Plaid Pantries*, have concluded that under the plain language of § 507(a)(4), various claims for unpaid insurance premiums are entitled to priority treatment. *Howard Delivery*, 403 F.3d at 232-233; Pet. App. 9a-11a. For the reasons discussed below, these cases do not support a finding that § 507(a)(4) was meant to include unpaid workers' compensation insurance premiums.

The majority of the cases cited by Judge King deal with unpaid insurance premiums for life, health and/or disability insurance, rather than workers' compensation insurance. *Ivey v. Great W. Life & Annuity Ins. Co.*, 308 B.R. 752 (M.D.N.C. 2004), *aff'd*, 405 F.3d 191 (4th Cir. 2005) (unpaid health insurance premiums); *Principal Mut. Life Ins. Co. v. Joint Comm. of Unsecured Creditors (In re CirrusCorp)*, 196 B.R. 76 (S.D. Tex. 1996) (same); *Allegheny Int'l, Inc. v. Metro. Life Ins. Co.*, 145 B.R. 820 (W.D. Pa. 1992) (unpaid life insurance premiums); *Official Labor Creditors Comm. v. Jet Fla. Sys., Inc. (In re Jet Fla. Sys., Inc.)*, 80 B.R. 544 (S.D. Fla. 1987) (unpaid medical expense reimbursements); *In re A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759 (Bankr. M.D. Fla. 2001) (same); *In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998) (unpaid health and life insurance premiums). These cases do not address the distinct characteristics of workers' compensation premiums, as discussed in Section I.2., *supra*, and are thus inapposite.

The treatment of claims for unpaid workers' compensation insurance premiums was addressed in *Plaid Pantries*, 10 F.3d 605 (9th Cir. 1993), *In re Integrated Health Servs., Inc.*, 291 B.R. 611 (Bankr. D. Del. 2003), and *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*,

85 B.R. 183 (Bankr. D.C. 1988). For various reasons, these cases did not reach the correct result.

For example, in *Plaid Pantries*, 10 F.3d 605, the Ninth Circuit did not perform a detailed analysis of either the plain meaning of § 507(a)(4) or its legislative history, but nevertheless concluded that there was no reason to believe that Congress intended to distinguish between statutorily required coverage such as workers' compensation insurance and contractually promised benefits such as health, welfare and pension plans. Significantly, the court gave no recognition to the underlying principle of bankruptcy law that priorities are to be narrowly construed and failed to consider whether it was the employer, rather than the employee, who was the true beneficiary of workers' compensation liability insurance.

Likewise, in *Integrated Health Servs.*, 291 B.R. 611, the bankruptcy court not only overlooked the need to narrowly construe the priority provisions of the Bankruptcy Code, but in essence embraced an improperly expansive reading of these provisions. The court supported its holding that workers' compensation insurance premiums were to be included in § 507(a)(4) by finding that "there was no clearly expressed legislative intent to exclude workers' compensation benefits form the plain language of § 507(a)(4)." 291 B.R. at 614. Yet, the proper test is not whether there is a clearly expressed legislative intent to **exclude** these benefits, but rather whether there is a clearly expressed legislative intent to **include** them. Since bankruptcy priorities are an exception to the general rule that creditors should share equally in the assets of a bankrupt estate, the inclusion of particular claims within the priority provisions of the bankruptcy code must be authorized by Congress in clear and unequivocal terms. *Embassy Restaurant*, 359 U.S. at 31, 33. A finding that such claims are not expressly excluded is insufficient.

Finally, the priority of workers' compensation insurance premiums was considered in *AOV Indus.*, 85 B.R. 183, in connection with the defense to an action for the avoidance of alleged preferential payments by the debtor. However, as Judge King acknowledges in his concurring opinion, 403 F.3d at 233, Pet. App. 10a, this aspect of the bankruptcy court's decision was dicta, since the court granted summary judgment defeating the preference claims on an entirely different basis.[21]

Accordingly, the cases that have followed the ruling of the Ninth Circuit in *Plaid Pantries* do not present a solid foundation for holding that unpaid workers' compensation insurance premiums are entitled to priority treatment under § 507(a)(4) and do not undermine the sound reasoning of the Sixth, Eighth and Tenth Circuits that have disagreed with the Ninth Circuit's holding in *Plaid Pantries*.

II. The Legislative History of § 507(a)(4) Supports the Plain Meaning That a Claim for Premiums Due Under a Workers' Compensation Insurance Policy Is Not Entitled to Priority Treatment and, in Any Event, Resolves Any Possible Ambiguity in the Language.

Although the plain meaning of § 507(a)(4) is generally the end of the analysis under *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), a review of the legislative history of the statute is nevertheless appropriate in this case. This Court, in *Ron Pair*, recognized that a review of the legislative history is appropriate to determine whether "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Citing to two bankruptcy cases, *Mid-Atlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494 (1986) and *Kelly v. Robinson*, 479

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21. *Accord Minte*, 286 B.R. 1, 5 n.10 (the conclusions of the court in *AOV Indus.* regarding § 507(a)(4) were unnecessary dicta).

U.S. 36 (1986), the Court in *Ron Pair* recognized that "in an appropriate case, a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code." 489 U.S. at 245. In this case, it is appropriate to consider the legislative history behind § 507(a)(4) to ensure that any given interpretation of this provision is not at odds with the underlying principle that bankruptcy priorities are to be narrowly construed. Alternatively, it is appropriate to look to the legislative history if the language of § 507(a)(4) is found to be ambiguous. *See, e.g., Southern Star Foods*, 144 F.3d at 715 ("Because the phrase [contributions to an employee benefit plan] is ambiguous, we turn to the legislative history of the statute to aid our analysis.").

Regardless of the justification, a review of the Congressional intent confirms that when Congress granted priority treatment to claims for "contributions to an employee benefit plan arising from services rendered," it intended such treatment only for certain employee fringe benefits, such as health, welfare and pension plans, that served as bargained-for wage substitutes, and not for workers' compensation insurance premiums mandated by state law.

Congress enacted § 507(a)(4) in 1978 specifically to overrule the holdings of this Court in *Embassy Restaurant*, 359 U.S. 29 (1959), and *Joint Industrial Board*, 391 U.S. 224 (1968). Those cases rejected the argument that fringe benefits were "wages . . . due to workmen" entitled to priority treatment under 11 U.S.C. § 104(a)(2), the predecessor to § 507(a)(4).[22] Section 507(a)(4) was a direct response to these cases. As the House Report explained:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, which held that fringe benefits were

22. In *Embassy Restaurant*, 359 U.S. at 29, the fringe benefits were contributions to a union welfare plan; in *Joint Industry*, 391 U.S. at 225, they were contributions to a union annuity plan.

> not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, **under which wage demands are often reduced if adequate fringe benefits are substituted.** The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered[.]

H.R. Rep. No. 95-595, at 357 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (internal citation omitted) (emphasis added).

The legislative history makes it clear that this new provision was intended to cover bargained-for fringe benefits that served as wage substitutes:

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades wage dollars for fringe benefits, does a severe disservice to those working for a failing enterprise.
>
> . . . [T]he bill establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds **and all other forms of employee compensation that is not in the form of wages**.

Id. (emphasis added).[23] *Accord* S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

Finally, the Senate Report confirms that §§ 507(a)(3) and (a)(4) are to be read together to provide employees with priority treatment for unpaid wages and fringe benefits.

> Under current law, employees currently are allowed a $600 priority for unpaid wages, which does not include any claims for contributions to employee benefit plans such as pension, health and life insurance plans. The Bill's priority section will raise the $600 limit to $1,800 and create an additional separate priority of up to $1,800 for fringe benefits. **Any one employee's combined priority for wages and fringe benefits, however, cannot exceed $1,800.**

S. Rep. No. 95-989, *reprinted in* 1978 U.S.C.C.A.N. at 5791-92 (emphasis added).

The legislative history recognizes "fringe benefits" as a voluntary substitute for wages. This is consistent with the accepted definition of "fringe benefits" as "an employment benefit (as a pension, a paid holiday, or health insurance) granted by an employer that involves a money cost without affecting basic wage rates." *Webster's Ninth New Collegiate Dictionary* 494 (1987).

Workers' compensation insurance policies, by contrast, are not fringe benefits.

> Workers' compensation coverage . . . is not a fringe benefit that an employee can bargain for, either

23. These changes are described under the heading "Wages and Fringe Benefits." H.R. Rep. No. 95-595, at 357 (1977).

> explicitly or impliedly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee.

Southern Star Foods, 144 F.3d at 716. The Sixth Circuit, in *Birmingham-Nashville Express*, reached the same conclusion, holding that "the term 'employee benefit plan' is limited to wage substitutes" and "workers' compensation is not a wage substitute; rather, it is an award arising out of a work-related injury owed by an employer." 224 F.3d at 517.

The District Court in *HLM Corp.* carefully considered whether a workers' compensation insurance policy obtained pursuant to Minnesota's workers' compensation statute was a fringe benefit falling within the definition of "employee benefit plan." 183 B.R. 852 (D. Minn. 1994), *aff'd* 62 F.3d 224 (8th Cir. 1995). The court's analysis, which is equally applicable to the West Virginia statute, underscores the fundamental differences between workers' compensation coverage on the one hand, and the health, welfare and pension plans that fall with the scope of § 507(a)(4):[24]

> Payments for a workers' compensation policy are not bargained-for substitutes for wages. In Minnesota, they are mandated by statute. . . .

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24. Of course, the resolution of this issue should not hinge upon which state's workers' compensation statute is applicable. Bankruptcy priorities must be applied not just narrowly, but uniformly. *See, e.g., City of New York v. Feiring*, 313 U.S. 283, 285 (1941) (bankruptcy priorities are intended to be nationwide in their application and not controlled or varied by state law).

> Thus, in "the realities of contract negotiations," unlike medical, health and life insurance, payment of workers' compensation premiums is irrelevant to the bargaining process. Employers may not choose to forego purchasing workers' compensation insurance, and employees may not choose to accept a higher wage in lieu of the insurance. As a result, payments to a workers' compensation insurance carrier are not bargained-for wage substitutes.

Id. at 856. The Eighth Circuit affirmed this analysis in *HLM Corp.*, 62 F.3d 224, 225 (8th Cir. 1995).

Furthermore, unlike pension plans and life, health and disability insurance plans that inure directly and exclusively to the benefit of the employee, workers' compensation insurance inures to the benefit of the employer by providing a means for the employer to allocate risk. It allows an employer to make a finite, predictable outlay rather than risking unpredictable and potentially crippling workers' compensation payments to injured employees. The employee's right to payment is exactly the same, regardless of whether it comes directly from the employer or indirectly from the carrier. This right to payment is fixed by statute and totally unaffected by the insured or uninsured status of an employer. *HLM Corp.*, 183 B.R. at 856.

In his concurring opinion below, Judge King rejects the holdings of the Sixth, Eighth and Tenth Circuits that found that Congress did not intend unpaid workers' compensation insurance premiums to receive priority treatment. Agreeing instead with the Ninth Circuit in *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993), Judge King asserted that, while benefits did admittedly flow to Howard pursuant to the workers' compensation insurance policy issued by Zurich, the coverage "plainly inured to the benefit of Howard's employees." *Howard Delivery Serv.*, 403 F.3d at 237, Pet. App. 19a. However, Judge King's ruling, as

is true of the Ninth Circuit's ruling in *Plaid Pantries*, inappropriately broadens the scope of § 507(a)(4) in contravention of the purpose and plain language of the priority provisions of the Bankruptcy Code.

Moreover, the ruling in *Plaid Pantries* was premised on the faulty propositions that workers' compensation benefits are comparable to other forms of compensation because they "are generally funded by insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices." *Plaid Pantries*, 10 F.3d at 607. Yet, in West Virginia and elsewhere, this simply is not the case.

First, § 23-2-7 of the West Virginia workers' compensation statute prohibits parties from bargaining away their rights and responsibilities under the statute.[25] Thus, there is no basis to conclude that workers' compensation insurance is a benefit received in lieu of higher wages. Second, the argument ignores the fact that employees in West Virginia receive workers' compensation coverage even when the employer fails to pay the premiums due a third party such as Zurich. As employees receive the same coverage whether or not the premiums are paid, there is no reason why § 507(a)(4) should be broadened to include claims for these unpaid premiums.[26]

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25. "No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be *pro tanto* void." W. VA. CODE § 23-2-7 (1988).

26. As discussed in Section I.2. *supra*, if the premiums are due directly to the West Virginia Workers' Compensation Fund, the Fund is entitled to a level seven priority based upon the priority granted to certain taxes. There is nothing in the language of the statute or the legislative history to suggest that Congress intended private insurers to receive a higher level of priority than is provided the Fund.

The fringe benefits falling within the definition of "employee benefit plans" all have one common feature — the sole beneficiary **is the employee**. These fringe benefits are consistent with the congressional intent that led to the addition of § 507(a)(4) to the wage priority of § 507(a)(3), for these priorities were intended to work collectively to protect employees and their representatives.[27] By contrast, the party that principally benefits from the issuance of a workers' compensation insurance policy **is the employer**, as the insured under the policy. With or without the workers' compensation insurance policy, the employee is still entitled to the benefits provided by the workers' compensation statute. If the employer fails to pay the insurance premiums, the employee retains the right to pursue his common law tort claims and the defaulting employer loses the common law defenses of the fellow-servant rule, assumption of risk and contributory negligence.[28]

Thus, there is a fundamental difference between workers' compensation insurance policies that are provided pursuant to statute, and health, welfare and pension plans that are provided as an employee fringe benefit. The legislative history of § 507(a)(4) demonstrates that only the latter were intended by Congress to receive priority treatment under the Bankruptcy Code. The Fourth Circuit's contrary reading of § 507(a)(4) violates the underlying principle that priorities be construed narrowly and the admonition of this Court in *Embassy Restaurant* that "if one claimant is to be preferred

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27. The House Report states that the purpose of the 1978 Amendment to § 507(a) was to "provide additional protection to the employees of a bankrupt enterprise." This was accomplished through two changes in "the wage priority." First, the priority for wages was increased from $600 to $2,400. Second, § 507(a)(4) was added to cover "forms of employee compensation that is not in the form of wages." H.R. Rep. No. 95-595, at 357 (1977).

28. *See, e.g.*, W. VA. CODE § 23-2-8 (1988).

over others, the purpose should be clear from the statute." 359 U.S. at 31. In the absence of clear language that claims for unpaid workers' compensation insurance premiums are to be included within § 507(a)(4), the Court below was not free to create such a priority.

CONCLUSION

Section 507(a)(4) of the Bankruptcy Code establishes a priority for "contributions to an employee benefit plan arising from services rendered." This priority, like all bankruptcy priorities, must be narrowly construed, and a claim may only receive priority treatment when authorized by Congress in clear and unequivocal terms.

The Fourth Circuit erred in holding that the plain language of § 507(a)(4) extended to unpaid workers' compensation insurance premiums. Furthermore, to the extent the language of § 507(a)(4) is ambiguous, the Fourth Circuit did not correctly interpret and apply the legislative intent of the priority statute. As a result, the Fourth Circuit improperly expanded the scope of § 507(a)(4) of the Bankruptcy Code to the detriment of other creditors.

For all of the reasons stated herein, Howard and the Committee respectfully request that this Court reverse the decision of the Fourth Circuit and deny priority treatment to Zurich's claim for unpaid insurance premiums.

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